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David Thayne Jones v. State of Utah : Reply Brief of Appellant

Utah Court of Appeals

(3.)

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IN THE UTAH COURT OF APPEALS

avid Thayne Jones,
Petitioner / Appellant

v.

State of Utah,
Respondent / Appellee.

Case No. 20010375-CA

Priority No. 2

REPLY BRIEF OF APPELLANT

APPEAL FROM DISMISSAL OF PETITION FOR WRIT OF HABEAS CORPUS IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF UTAH, BY THE HONORABLE W. BRENT WEST, DISTRICT COURT JUDGE.

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This is supported by the decision of the United States Supreme Court in the case of McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 418 (1969) where the court stated that because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

The defendant in this case did not understand the proceedings because of his mental illness, and was not competent to make a plea. The trial court itself cast doubt as to the defendant's mental ability when it accepted defendant's plea: "Now you understand, Mr. Jones, that if you plead guilty but mentally ill, you're saying that I'm having some mental problems, but those mental problems are not -- not enough to make a defense of not guilty by reason of insanity. You understand?" R. 107, February 20, 1990 Hearing p. 3)

Defendant's attorney questioned his mental ability as well: "The circumstances in the defendant's life has been full of depression and that kind of stuff, and I'm not a psychiatrist, but I would not feel comfortable personally with the sentencing unless we did have a rather extensive review of it." (R. 115, February 20, 1990 p. 11) Then the defendant stated that "...My problems have been kind of accelerating the past three years. I've been down in the State Hospital five times." R. 116, February 20, 1990 Hearing p. 12)

It is clear and supported by the record that the trial judge did not hold the hearing as required by statute 77-35-21.5 which governed a plea of guilty but mentally ill in 1990. In this case, other than the testimony of the defendant that he understood what he was charged with and accepted the plea, there was no alienist reports or other evidence presented to the court for the court to determine that the defendant was competent to make a plea.

Thus, the trial court committed reversible error when it permitted the defendant to plead guilty but mentally ill to a charge that the facts did not support, without holding a hearing or receiving evidence to determine if the defendant was competent at the time of the plea to make the plea knowingly and voluntarily made, and the trial court failed to determine whether there was a factual basis for the pleas as required by State v. Gibbons, 740 P. 2d 1309 (Utah 1987); See also State v. Maguire, 830 P. 2d 216 (Utah 1992); State v. Hoff, 814 P. 2d 1119 (Utah 1991)

A mentally incompetent defendant can provide no defense and proceedings against such a defendant do not comport with due process. State v. Young, 780 P. 2d 1233, 1236 (Utah 1989) (citing Dusky v. United States, 362 U.S. 402, 402 (1960). "In determining whether a defendant is competent to plead guilty, the trial court must consider," whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of factual understanding and has a rational as well as a factual understanding of the proceedings against him." State v. Holland, 921 P. 2d 430 (Utah 1996). In the case of Jacob v. State of Utah, 415 Adv Rep 17, at 18 (Utah 2001) the Utah Supreme Court found the defendant

competent to make the plea on the basis of three alienist reports, without a hearing. However, the Court stated that "A trial court must hold a competency hearing when there is a substantial question of possible doubt as to a defendants competency at the time of the guilty plea."

The defendant has consistently urged throughout all the various hearings that he did not intend to murder anyone, that his speed of his automobile was not more than twenty five miles per hour when he collided with the other automobile.

Standard police procedure requires an accident report in any automobile accident, such as measurements of skid marks, which could show that the defendant tried to avoid this accident, and that it was not an act of premeditated intentional murder. The defendant has made efforts to obtain this report, however, it seems to be missing from the files. Evidence claimed to be lost or destroyed by the prosecution is considered suppressed, and contrary to testimony given at the hearing of February 23, 2001 that everyone was aware of the defendants intoxication, this is not supported by the record whatsoever in 1990. There was no intoxication report, or mention of it, and no charge of D.U.I. although defendant was initially charged with one.

"It does strike me somewhat as unusual that he was arrested for a DUI and then ultimately not charged for a DUI." stated the district court judge. (T. February 23, 2001 Hearing, p. 193) "I admit that perhaps from the record that I've heard today that the report saying that the toxicalogy report of a .22 was probably not in the file." (T. February 23, 2001 Hearing p 195)

The testimony given in 1990 is not consistent with the testimony given eleven years later. Defendant's attorney, Mr. Allen stated "I recall talking to him about it... there wasn't a whole lot of question about the fact that he had purposely driven into the car." (T. February 23, 2001 Hearing p. 46). Mr. Allen stated previously "In fairness to the Court, Your Honor, the discussion preceding the entering of the plea, the discussion was -- did go on between myself and Mr. Jones. He questioned whether -- he questioned the fact that he intentionally tried to run into this car." (R. 141, 142, June 18, 1990 Hearing p. 11, 12)

The evidence and the facts of this case do not support a charge of attempted murder, and absent a guilty plea, would not hold up before a trier of fact or investigation. Defendant has raised this issues before the district court. (R. 1, 2, 3, 4, 5, Petition For Writ of Habeas Corpus) And the district court summarily dismissed them. "With one exception, the Court is granting the respondents motion to dismiss petitioner's writ of habeas corpus. Every issue raised in the petitioner's writ, except the issue of whether or not the weber county attorney's office committed prosecutorial misconduct by withholding exculpatory evidence from the petitioner, is currently on appeal to the Utah Court of Appeals. As such, those issues are not appropriate for review in a writ of habeas corpus." (R. 010, Decision)

The trial court stated "... until the plea arrangement is set aside by the Court of Appeals or someone else, no one gets to the issue of whether you were guilty or not guilty because you imposed a plea of guilty but mentally ill." (T. February 23, 2001 Hearing p. 215). "And so, I admit you've marshaled all of this evidence. But I've not heard

From officer Hood. Ilve not heard from Ms. Vanborough. Ilve not heard from your ex-girlfriend." (T. February 23, 2001 Hearing p. 216).

The Utah Court of Appeals, stated in its Memorandum Decision dated January 17, 2002: "If defendant wishes to attack the validity of his plea or conviction, he may proceed under Rules 65B and 65C of the Utah Rules of Civil Procedure." (State v. Jones, 2002 UT App 12) Those issues were raised in the district court and dismissed without addressing them, thus the grounds for raising them in this appeal.

Defendant's motion to withdraw his guilty plea was denied at hearing held on June 18, 1990. Defendant stated that he was not competent at the time he entered the plea: "I was in a state of mind where I was not really functional as to my surroundings or proceedings... I wasn't fully aware of what was going on." (R. 140, June 18, 1990 Hearing p. 10) Defendant's attorney, Mr. Allen testified that "It may be -- It may be that one thing that helped the -- talked him into entering a plea was the belief that he might finally get into the State Hospital for full treatment." (R. 143, June 18, 1990 Hearing p. 13).

Mr. Caine testified that "..he believes that he -- by pleading guilty to attempted homicide... that he has admitted that he intentionally tried to kill someone with a vehicle and wants it clear that he didn't do that." (R. 132, 133 June 18, 1990 Hearing p. 2, 3) Mr. Daines, the prosecutor stated that "as the defendant was driving down the street there was a car coming in the other direction, and he specifically and purposely turned his automobile into that vehicle and then subsequently admitted to the officers that he had, thinking that was a police

officer in that car." (R. 134, June 18, 1990 Hearing p.4) Defendant did not admit he purposely turned into the other vehicle, but only stated to the officer that he thought it was a police car.

Defendant's attorney stated "well, the record also reflected -- the police report states that on a different occasion he made a statement regarding his girlfriend." (R. 136, June 18, 1990 Hearing p. 6)

It is an accepted premise in American jurisprudence that any conviction obtained by the use of false testimony is fundamentally unfair and totally incompatable with "rudimentary demands on justice." See Giglio v. United States, 405 U.S, 150, 153, 92 S. Ct. 763, 765, 31 L. Ed. 2d 104 (1972), quoting from Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). The same result obtains when the State, allows it to go uncorrected when it appears. State v. Jarrell, Utah, 608 P. 2d 218 (1980) This standard derives from both the prosecutorial misconduct and more importantly the fact that the use of false evidence involves a corruption of the truth seeking function of the trial process. Id., at 225.

The hearsay of the statement made by officer Sessor Hood was known to be false and misleading. "After arresting Jones off. Peterson was informed by Jones of intentions prior to the collision and he stated to off. Peterson that he intentionally tried to crash his vehicle into Ms. Bambrough because he believed she was his ex-girlfriend and he wanted to kill her." (R. 280 Police Report of Sessor Hood) Defendant did not make this statement, and it can be proven that his ex-girlfriend did not even have access to a car.

Defendant's "ex-girlfriend" had her car impounded three months previous in Brigham City case no. 89002276 TC, on October 21, 1989 and never reclaimed her car. It was subsequently sold at auction, when the prosecutor, Mr. Daines was questioned about these conflicting reports, he was asked if it said anything in officer Petersons report about an ex-girlfriend. Mr. Daines: "It doesn't say anything in this small report about an ex-girlfriend". Mr. Neeley: "okay. Now, would you please turn to the other report of officer Peterson?" Mr. Daines: "I can -- I have the report here. It's difficult to read." Mr. Neeley: "In that report does it say anything about an ex-girlfriend" Mr. Daines: "I don't see anything that say ex-girlfriend" (T. February 23, 2001 Hearing p. 83, 84)

And this alleged statement was supposedly made when defendant was "totally incoherent" according to the report made by Sterling Hollingshead, a Registered Nurse that took blood samples at the scene of the accident. (Request For Laboratory Examination, Ex. 2, T. February 23, 2001 p. 52)

I. CLAIMS THAT THE RECORD DOES NOT SUPPORT INEFFECTIVE ASSISTANCE OF COUNSEL IS UNFOUNDED.

The district court has ruled that "while there may have been the possibility of raising the defense based on the intoxication, the overriding concern seemed to be that you get to the State Hospital and that you receive treatment or assistance or the help that you needed." (T. February 23, 2001 p. 196). "The law, at that time as we have discussed in other hearings, clearly indicated that you're -- you

ould go to the hospital until such time as you were le termined to be returned to competency..." (T. February 23, 2001 Hearing p. 197). This statement made by the district court judge, in itself casts doubt to the defendant's competency to enter a guilty plea.

The Court also stated at this hearing that questions be limited only to prosecutorial misconduct. " All other issues that Mr. Jones has raised have been preserved and my understanding is they're on appeal and a Court of Appeals will address that. The only issue that this hearing was granted on is no one has ever addressed Mr. Jones' allegations that there may have been prosecutorial misconduct in this case. So all other issues about the voluntariness of his plea, his competency to enter that plea, they've all been preserved on his appeal and they will address whether or not Judge Taylor should have withdrawn his plea or not." (T. February 23, 2001 Hearing p. 171, 172) See State v. Jones, 2002 UT App 12, where the court ruled " If defendant wishes to attack the validity of his plea or conviction, he may proceed under Rules 65 B and 65 C of the Utah Rules of Civil Procedure."

A. DEFENSE COUNSEL WAS INEFFECTIVE IN ALLOWING DEFENDANT TO PLEAD GUILTY TO ATTEMPTED MURDER WHEN THE STATE'S EVIDENCE DID NOT SUPPORT THE PLEA.

The crime of attempted murder requires proof of ntent to kill ... an attempt to commit a crime requires roof of an intent to consummate the crime. See State v. Bell, 785 P.2d 390 (Utah 1989) In order to convict someone of murder, a jury must find that (1) that the defendant acted knowingly (2) in creating

. grave risk of death (3) that the defendant knew the risk of death was grave, (4) which means a highly likely probability of death, and (5) that the conduct evidenced an utter callousness and indifference toward human life. State v. Standiford, 769 P.2d 254 (Utah 1988).

None of the above requirements for a plea of attempted murder were met by the facts of this case of a 25 miles per hour automobile accident. The defendant has consistently testified that he did not attempt to murder anyone. "At the time -- the night that this happened I had been drinking with my ex-girlfriend... she did not have a car so she was driving my car... I took her home and I asked if I could spend the night because I was intoxicated and didn't feel I should drive... she did not think it was a good idea... I'd been staying at a place out in Layton... there was an apartment there that I had been staying in while my girlfriend was in the psyche ward, because that's where I had been living."

"I went there, there was no one there, I didn't have a key to the place. I went to the owners home, there was no one there, it was winter, it was cold. I was coming back to Ogden to try and find another friend to stay with the night, because I was cold and I couldn't stay in my car... I came off the freeway... A police officer turned on his lights on me... I kept driving the car... I wasn't sure how to deal with it... I turned around a residential corner and there was a car coming directly towards me which I thought was another police car attempting to block my way off. And I put my hands in the air and says, I give up. No[t] realizing

my car was still going, and I ran into this car. There was no intent to -- that there was to kill anyone. I never made any statements that it was my girlfriend — that I thought it was my girlfriend ... Officer Peterson said, who did you think was in the car? I said, I thought it was a cop. I never said I ran into it because I thought it was a cop.... I came to ... at the hospital ... I stated to an officer "where is [K]athy?" which is my ex-girlfriend ... she was driving ... I thought she was driving my car which she had been previously that night..." (T. February 23, 2001 Hearing P. 175, 176, 177, 178, 179)

"Everybody thats testified is, to their recollection. They can't remember ... admittedly there was no toxicology report in the state's file. Now, everybody recalls that they may have had that information but nobody can say some certainly did ... Now, Bill Daines testified that there was a notation in the file ... that it was .22. And that he also testified he doesn't know if he gave that information to the defense attorneys at that time ... Bernie Allen testified he doesn't know if these reports were in the file. To his recollection he knew about the information ... John Caine testified that he had no recollection of these reports being in the file ... Our premise is that more is required than just making it available, that it has to be produced according to the case law ... On those grounds, Your Honor, we request that ... number one, is the prosecutorial misconduct of documents being concealed. And number two, the argument of probabl[e] cause when the case was charged. That there was no probabl[e] cause because the testimonies and everything was conflicting, and they did not have everything in the

file to charge those charges." (T. February 23, 2001 Hearing p. 184, 185, 186, 187)

B. DEFENSE COUNSEL WAS INEFFECTIVE FOR WAIVING A PRELIMINARY HEARING WITHOUT CONSULTING DEFENDANT.

where a preliminary hearing would establish these above facts, the insufficient evidence and lack of probable cause in this case, it could not be said to be reasonable to waive this hearing as a matter of course. Counsel was deficient for waiving this necessary examination of this offense, and by doing so he prejudiced the defense because the conflicting testimony, and highly unlikely risk of death by a 25 mph automobile accident, and other facts in this case would not have supported a charge of attempted murder. Defense counsel had no reason given for intelligent strategy in this case, and he testified that he always waives the preliminary hearing. "Thatls been my practice for 27 years" (T. February 23, 2001 Hearing p. 145). See Strickland v. Washington, 466 U.S. at 687, 104 S Ct. at 2064, 80 L. Ed. 2d 674 (1984); also see, e.g. Fernandez v. Cook, 217 Utah Adv. Rep. 3, 6 (July 12, 1993); State v. Verde, 770 P.2d 116, 119 (Utah 1989); State v. Speer, 750 P.2d 186, 191-92 (Utah 1988). "Strickland stated that when reviewing an ineffectiveness claim, it is not necessary to determine whether counsels performance was deficient before judging whether prejudice resulted from the alleged deficiencies. Rather, if it is easier to dispose of the claim due to lack of sufficient prejudice, then that course should be followed." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

C. DEFENSE COUNSEL NEVER DISCUSSED AN INTOXICATION DEFENSE WITH PETITIONER.

The evidence in this case, which is supported by the record lacks any mention of intoxication of the defendant. At the hearing held on February 23, 2001, everyone seems to recollect that defendant was intoxicated, however in the entire record of proceedings held in this case in 1990, there is nothing mentioned about defendant being intoxicated, and the charge of D.U.I., the toxicology report of .22 blood alcohol, and the request for laboratory examination are all missing from the case file. (R. 105-122 February 20, 1990 Hearing p. 2-17; R. 124-129 March 19, 1990 Hearing p. 2-5; R. 131-145 June 18, 1990 Hearing p. 2-14)

Defendant's attorney Mr. Allen testified at the hearing on February 23, 2001 "... there was some dispute, if I recall about whether the car - whether he had intended to drive into a police car or intended to drive into a car... that he thought was being driven by his girlfriend, or something." (T. February 23, 2001 p. 46) And his statements are not consistent with his testimony eleven years before. "The police -- took the inference that he was saying that it was his girlfriend", and "In my -- to be honest with you, the way the second report is written, it appears to me that its more like a response, firing back at the cop for grilling him--" (R. 136, 137 June 18, 1990 Hearing p. 6,7) Mr. Allen stated that "And I explained to him on numerous occasions that we had two choices. We could enter the plea of guilty but mentally ill to the offense as charged." R. 142 June 18, 1990 Hearing p. 12) There is nothing ever mentioned in the record of 1990 of a defense of intoxicatron, thus we see that if the record

is reviewed for correctness, the facts themselves cast a reasonable doubt as to the vague recollections testified to eleven years later.

D. THE CLAIMS MADE THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE IN ALLOWING PETITIONER TO PLEAD GUILTY WITHOUT REQUESTING A COMPETENCY HEARING WHERE NOTHING IN PETITIONER'S CONDUCT INDICATED HE WAS INCOMPETENT AT THE TIME HIS PLEA WAS ENTERED ARE WITHOUT MERIT.

The testimony given at the hearing held on February 23, 2001 again is not consistent with the record of hearings held in 1990 in this case. At the time of the plea being entered, defendant's attorney Mr. Allen stated "..there's this cloud of mental illness around him. And its not always just from Mr. Jones. It's from discussions from some of the local mental health treaters as well." (R. 117 February 20, 1990 Hearing p. 13)

Mr. Allen also testified "... and if he's not crazy, he certainly is evidencing bizarre enough behavior." (R. 126 March 19, 1990 Hearing p. 3) And: "... And to be honest with you, my impression is that his thought processes are out of whack." (R. 137 June 18, 1990 Hearing p. 7) Defendant testified that "... I kind of slip in and out.... I've had brief psychotic episodes where I didn't know what was going on..." (R. 116 February 20, 1990 Hearing p. 12) Mr. Allen also stated "I do have a - Mr. Jones has had run-in after run-in with the local mental health facilities... I think that under the circumstances of this last incident, this case and the seriousness of this case, that it is not appropriate to bring him up for that determination

without the State Hospital having had an opportunity to review exactly what this situation was about and he clearly was not down there prior to this happening." (R. 115 February 20, 1990 Hearing p. 11)

Thus we see when reviewing the record in 990 that sufficient doubt was raised concerning the defendants competency at the time of the plea being entered, and trial counsel was ineffective in not requesting a competency hearing before allowing defendant to enter a plea.

E. COUNSEL WAS INEFFECTIVE IN THIS CASE FOR NOT PERFECTING AN APPEAL ON PETITIONER'S MOTION TO WITHDRAW HIS PLEA.

" Petitioner asked counsel to file an appeal of the denial to withdraw his plea, and counsel told him that he would appeal, filed a notice of appeal and then allowed the appeal to be dismissed for his failure to file a docketing statement." (R. 4 Petition For Writ of Habeas Corpus)

This, as well as other issues were raised nd preserved in the district court. Clearly, the notion to withdraw the guilty plea had merit, and lefendant's counsel was ineffective by not perfecting he appeal, therefore the Appellate Court never considered whether the trial court committed a reversible error in denying the motion.

The district court committed reversible error s well in dismissing the remaining issues that were ppropriate for review in this petition for a writ f habeas corpus that attack the validity of the

petitioner's conviction and plea, and therefore are properly made in this appeal as well.

CONCLUSION

Based on the foregoing, and the petition for writ of habeas corpus, and the claims preserved in the district court and appellant's brief, the Appellant asks this Court to vacate the conviction, and reverse to the district court with instructions to allow the appellant to withdraw his guilty plea, and to hold a trial to determine the sufficiency of the evidence in the interest of a truth seeking function and properly make a finding before triers of fact and evidence of whether appellant is guilty or not.

ORAL ARGUMENT AND PUBLISHED OPINION ARE REQUESTED.

Because appellant is not a trained lawyer, and has no experience in briefing the court, the issues have not been entirely briefed, and the appellant requests to therefore have oral argument in order to address all the facts.

RESPECTFULLY SUBMITTED 11th March, 2002.

David Thayne Jones
Appellant / Defendant

CERTIFICATE OF MAILING

I do hereby certify that I mailed, by U.S. Mail, two accurate copies of the foregoing **REPLY BRIEF**, on this 11th day of March, 2002 to the following:

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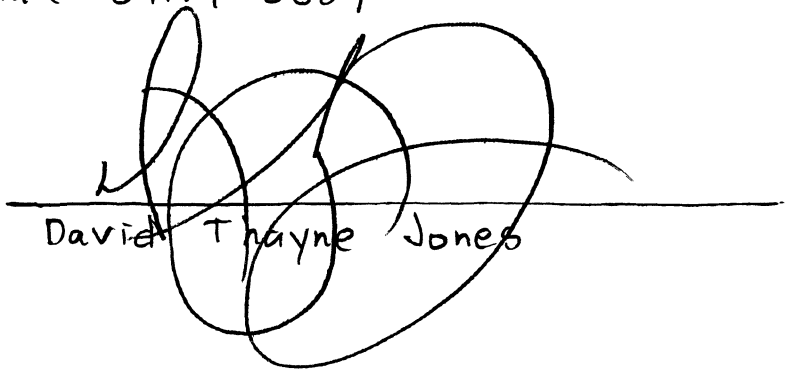

David Trayne Jones